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Pennsylvania

## Special Education Hearing Officer

### DECISION

ODR No. 01524-1011 AS

Child's Name: J.D.

Date of Birth: [redacted]

Dates of Hearing: 1/6/11, 2/11/11, 3/18/11, 3/25/11

### CLOSED HEARING

Parties to the Hearing:

Parents  
Parent[s]

LEA  
Montgomery County IU 23 EI Program  
1605 West Main Street  
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Date Record Closed:

Date of Decision:

Hearing Officer:

Representative:

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April 16, 2011

May 1, 2011

Anne L. Carroll, Esq.

## **INTRODUCTION AND PROCEDURAL HISTORY**

Parents in this case assert that the Intermediate Unit (IU) responsible for providing early intervention services to Student from September 2007 through September 2010 failed to meet that responsibility in a number of ways during the entire period of Student's eligibility for IU services.

Parents seek redress for all of the alleged lapses in the IU's services in the form of reimbursement for various evaluations and other out of pocket expenses, payment for services that the IU allegedly should have provided but refused, and compensatory education for the alleged insufficiencies and inadequacies in the services the IU did provide.

The record, however, compiled over four hearing sessions between the beginning of January and the end of March 2011, establishes that the IU sufficiently and appropriately met its early intervention obligations to Student under federal and state law. Parents' claims, therefore, are denied.

## **ISSUES**

1. Did the Intermediate Unit timely and appropriately identify all of Student's developmental early intervention needs?
2. Did the Intermediate Unit provide Student with IEPs reasonably calculated to assure that Student would make meaningful progress?
3. Did the Intermediate Unit provide sufficient services to appropriately meet Student's developmental early intervention needs?
4. Is the Intermediate Unit required to
  - a. Reimburse Parents for tuition costs of the private preschool Student attended
  - b. Reimburse Parents for other out of pocket expenses, including the costs of private evaluations provided for Student and/or other services and therapies
  - c. Provide payment to Parents for services at the [Redacted] Learning Center and/or for other services and therapies?
5. Are Parents entitled to an award of compensatory education and if so, for what period, in what amount and what form?

## **FINDINGS OF FACT**

1. Child is [early elementary school-aged], born [redacted]. At all times relevant to the matters in dispute between the parties in this case, Child and Parents resided within the boundaries of the [local] Intermediate (IU), and Child was eligible to receive early intervention services from the IU. 20 U.S.C. §1412(1)(1)(B); 34 C.F.R. §300.102(a)(1); 11 P.S. §875-103; 22 Pa. Code §§14.151—158; (Stipulation, N.T. pp. 15, 16)
2. At all times relevant to the matters in dispute in this case, Child was identified as an eligible young child due to a speech/language impairment in accordance with Federal and State Standards. 34 C.F.R. §300.8(a)(1), (c)(11); 11 P.S. §875-103; 24 P.S. §25-2509(b)(1). (Stipulation, N.T. p. 15)
3. The Child has received services for speech/language issues since the age of 19 months. The IU assumed responsibility for early intervention services from the Child's 3<sup>rd</sup> to 6<sup>th</sup> birthdays. (P-122, pp. 1, 2)
4. Although verbal/oral motor apraxia were recognized as disorders underlying the Child's speech/language disability from an early age, the definitive diagnosis of the very specific expressive language disorder, Childhood Apraxia of Speech (CAS), was made recently, in August 2010. CAS differs significantly from developmental language delays. (N.T. pp. 484—487, 489 )
5. According to standards adopted by the American Speech and Hearing Association, (ASHA), an appropriate level of speech/language services for CAS is 3—5 sessions/week, while a generalized developmental expressive language disorder can be sufficiently addressed with 1—2 sessions/week. (N.T. pp. 490—492)
6. The speech/language therapist who worked with the Child under a contract with the IU was specifically requested by Parents to provide speech/language therapy as part of the IU early intervention services. Although the CAS diagnosis was not made until close to the end of the Child's IU eligibility, she addressed the deficits specific to CAS in her therapy with the Child. (N.T. pp. 330, 334, 343, 494, 642, 643)
7. At the time the speech therapist began working with the Child, the Child's speech was unintelligible to anyone not familiar with the Child. As part of an IU evaluation, the speech therapist evaluated the Child in June 2008 at age [beyond 2 years], using the standardized Goldman-Fristoe Test of Articulation as one of the assessments. On that measure, the Child's language development was at an age equivalent of approximately 2 years. (N.T. pp. 341, 345—350; P-31)
8. At the recommendation of the speech therapist, the IU increased the Child's services to 3 45 minute sessions/week beginning at the end of September 2008. (N.T. pp. 353, 366; IU-21, p. 8)

9. The Child was evaluated by the Center for Childhood Communication at the Children's Hospital of Philadelphia (CHOP) in the fall of 2006 and the spring of 2009. In 2006, the evaluator found some delay in receptive language and a greater delay in expressive language. In 2009, the same evaluator noted excellent improvement in both receptive and expressive language, moving from a total language standard score of 68 in 2006 to a standard score of 96 in 2009, within normal limits. (P-5, P-47)
10. As of June 2010, the speech/language therapist reported that although the Child continues to have difficulty with language skills and was not yet performing at age expected levels, the Child had progressed to full intelligibility and could be understood by peers as well as family. (N.T. pp. 382—384; P-89)
11. After the IU evaluation in the summer of 2008, occupational therapy (OT) services were added to the Child's early intervention services. An itinerant learning support teacher was also provided for 1 hour each month, although the Child was demonstrating age appropriate cognitive skills. (IU-17, IU-21)
12. A pre-transition evaluation conducted in March 2009 by the School District in which the Child resides included an informal interview with the preschool teacher, who reported significant progress in the 2 years she taught the Child with respect to successful peer interactions and using language for effective communication. Improvements in coping and academic skills were also noted, although those areas still needed work. (IU-26, p.11)
13. Parents obtained an evaluation from the local [specialized tutoring center] Center in September 2009. Based upon the test results, including several measures of academic skills, intensive instruction was recommended (2 hr./day, 5 days/week). The instruction is directed toward developing reading and math skills. (N.T. pp. 275—281, 287—289, 599, 600)
14. In June 2010, Parents obtained a second Center evaluation, which showed higher scores on most of the assessments that were re-administered, although the Child did not receive the services recommended the previous year. Notably, on the Peabody Picture Vocabulary Test-IV, a standardized test of one word receptive vocabulary, the Child's performance improved from a standard score of 97 at the 42<sup>nd</sup> percentile in 2009 to 105, at the 63<sup>rd</sup> percentile, in 2010, showing growth in receptive vocabulary. (N.T. pp. 261, 293—295, 320; P-92)
15. The Center that tested the Child currently has no 4, 5, or 6 year old children receiving services. (N.T. p. 316)
16. A second School District evaluation in February 2010 reported additional significant improvement in social-emotional functioning and also reported significant gains in visual motor integration and cutting skills. (P-47, p. 13)

17. An independent neuro-psychologist selected by Parents evaluated the Child in the fall of 2010, subsequent to the end of the IU's responsibility for EI services. The evaluator determined that the Child's cognitive abilities and academic skills are in the average range, noting, however, the difficulty associated with such assessments due to age, normal developmental variability and compromised skills arising from the speech/language impairment. Although recognizing that language deficits associated with the Child's speech/language disability significantly impact other areas, such as attention, the evaluator concluded that Child has "well-developed intellectual and reasoning skills." (P-122, pp. 11, 12)
18. The evaluator also noted "no history of behavioral difficulties in the school, home or social settings." Based upon the current teacher's behavior scale rating, the Child is functioning within normal limits in all areas assessing problematic behaviors in the school setting with the exception of withdrawal. (N.T. p. 483; P-122, p. 10)

### **DISCUSSION AND CONCLUSIONS OF LAW**

By the end of the hearing in this case, the record established that Parents' opening statement crystallized the dispute in this case and illustrates very well why Parents could not prevail on their claims. Parents' counsel described the disputed issues as analogous to two different paths, one paved and straight and the other winding, rocky and windy. (N.T. pp. 19, 20) Parents in this case sought to compel the IU to provide the best possible path for the Child in order to assure a direct and speedy route to eventual academic success in a school age program, such that the Child will be able to make progress in a regular education curriculum commensurate with non-disabled peers. Federal, and particularly Pennsylvania, law does not, however, compel that outcome for several reasons.

First, for children aged 3—5 years the IDEA statute and regulations include an exception to the broad FAPE requirements applicable to school age students, providing that the responsible public agency's obligation to provide services to eligible young children is determined by state law. 20 U.S.C. §1412(a)(1)(B); 34 C.F.R. §300.102(a)(1). The relevant Pennsylvania statute and regulations, therefore, provide the standards for eligibility, early intervention services,

evaluation requirements, IEPs and the range of early intervention services available—in general provide the parameters of the IU’s responsibility to the Child in this case. *See* 11 P.S. §875-103; 22 Pa. Code §§14.152—14.155.

Moreover, as stated in court decisions describing the parameters of an appropriate education, public educational agencies are responsible for providing only “appropriate” services. Under that standard, an eligible young child is entitled to receive a free appropriate public education (FAPE) from the responsible local educational agency (LEA) that is “reasonably calculated to yield meaningful educational or early intervention benefit and student or child progress.” *Board of Education v. Rowley*, 458 U.S. 176, 102 S.Ct. 3034 (1982); *Mary Courtney T. v. School District of Philadelphia*, 575 F.3d 235, 249 (3<sup>rd</sup> Cir. 2009). “Meaningful benefit” means that an eligible child’s program affords him or her the opportunity for “significant learning.” *Ridgewood Board of Education v. N.E.*, 172 F.3d 238 (3<sup>RD</sup> Cir. 1999). An LEA is not required to provide an eligible student with services designed to provide the “absolute best” education or to maximize the child’s potential. *Mary Courtney T. v. School District of Philadelphia*, at 25; *Carlisle Area School District v. Scott P.*, 62 F.3d 520 (3<sup>rd</sup> Cir. 1995). An LEA, therefore, is not required to provide services that although desirable and likely to be beneficial, are not necessary in order to meet a school age child’s educational needs or an eligible young child’s early intervention needs.

Finally, even where particular services are necessary, the LEA has significant discretion to choose the means and method of providing them. In fact, although services requested by parents may be equally appropriate or better than a public agency’s proposal, the LEA is permitted to deny parents’ preference and select its own program and services, as long as the LEA’s selections appropriately meet the child’s needs. *See, e.g., J.E. v. Boyertown ASD*, 2011

WL 476537 (E.D. Pa. 2011); *J.C. v. New Fairfield Bd. of Educ.* 2011 WL 1322563 at \*16 (D.Conn. 2011); *D.G. v. Cooperstown Cent. Sch. Dist.*, 746 F.Supp.2d 435 (N.D.N.Y. 2010); *Rosinsky v. Green Bay Area School Dist.*, 667 F.Supp.2d 964, 984 (E.D.Wis. 2009).

This case centers on Parents' understandable desire to assure that their Child has the best possible chance for academic success despite a significant language disability. Under the circumstances presented by this case, however, Parents are not entitled to compel public funding for the services that they believe will best help the Child to reach that goal.

#### Burden of Proof/Parents' Evidence

In *Schaffer v. Weast*, 546 U.S. 49; 126 S. Ct. 528; 163 L. Ed. 2d 387 (2005), the Supreme Court established the principle that in IDEA due process hearings, as in other civil cases, the party seeking relief bears the burden of persuasion. Consequently, in this case, because Parents challenged the appropriateness of the IU's services, they had the obligation must establish that the EI services provided by the IU were not reasonably calculated to assure that Child received a meaningful benefit, in accordance with the applicable legal standards. Although the Court limited its holding in *Schaffer* to allocating the burden of persuasion, explicitly not specifying which party should bear the burden of production or going forward with the evidence at various points in the proceeding, it is customary for the party that brought the complaint to be the first to present evidence to establish the claims.

In this case, Parents presented a number of witnesses, but the testimony of the witnesses best able to testify concerning the issues in dispute, the Child's speech/language therapist, the director of the Center and the independent neuro-psychologist who evaluated the Child in October 2010, did not support Parents' claims against the IU.

Evaluation results and the testimony of the speech therapist established that during the 3 years the IU provided services, the Child made significant progress in speech articulation, including the ability to produce speech that is sufficiently intelligible to enable the Child to converse with non-family members. (FF 6—10) The objective testing provided by Center also supports the conclusion that the Child progressed in receptive language skills. (FF14)

After reporting the results of the most recent evaluation concerning the Child's difficulties arising from the language impairment, and supplementing her conclusions with testimony, Parents' independent psychologist could do no more than speculate that the Child would have been more successful with a higher level of speech therapy and other services. (N.T. p. 500) The psychologist's report also established that overall, the Child is functioning in the average range with respect to pre-academic skills. (FF 17) Parents provided no objective evidence that Student was exhibiting behaviors in the preschool school setting that warranted additional evaluations or services. Parents' independent evaluator, in fact, found no evidence of behavior issues from reviewing the Child's records. (FF18)

No testimony from Parents or their other witnesses could overcome the effect of the objective evidence of the Child's progress by professional service providers and an independent evaluator, all of whom Parents asked to testify and provide documents. Although Parents obviously experienced frustration as a result of staff changes and periodically missed services, and although additional evaluations and more services may well have led to additional benefits and progress for the Child, the IU was required only provide appropriate services that enabled the Child to receive a meaningful early intervention benefit. To the extent that there were procedural lapses, none rose to the level of impeding the Child's right to FAPE, substantially interfering with Parents' right to participate in decision-making for the Child or deprived the



Child of educational benefits in light of the substantive evidence of the Child's progress. *See* 34 C.F.R. §300.513(a)(1), (2), limiting a hearing officer's finding of a denial of FAPE to substantive matters. Consequently, Parents are not entitled to an award of compensatory education for any portion of the period in dispute.<sup>1</sup>

#### PreSchool Tuition Reimbursement/Center Services

In general, eligible young children are not entitled to public funding of preschool education as part of early intervention services. *Jonathan S. v. DCIU*, 809 A.2d 1051, 1058 (Pa. Commwlth 2002); *Appeal denied*, 835 A.2d 710 (Pa. 2003). Although attending a preschool program is certainly desirable and beneficial for all young children, nothing in the record of this case suggests that the Child required education in a preschool setting to meet developmental needs arising from the Child's identified disability, which remained speech/language impairment during the preschool years. Contrary to Parents' apparent belief, evaluation information concerning the Child's educational needs for kindergarten, as EI eligibility was ending does not establish that educational services were necessary during the preschool years in order to meet the Child's developmental needs. The Pennsylvania statute that defines "early intervention services" does not include a preschool education program as a specific component of the "developmental services" required to meet an eligible young child's "developmental needs." 11 P.S. §875-103. Parents asserted no legal or factual basis for their claim that the IU should reimburse the costs of the Child's typical preschool program. None of the IU's evaluation reports or IEPs state a need for a preschool program for either cognitive or social development. (FF)

There is even less justification for a claim that the IU should pay for either the Center evaluation or Center reading and math instruction. Parent learned about Center services through

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<sup>1</sup> In light of the substantive conclusion that the Child's progress in the IU program precludes a finding that the IU denied the Child FAPE, it is unnecessary to engage in a lengthy discussion of whether the IDEA statute of limitations precludes going back to September 2007.

an apraxia support group. (N.T. p. 599) The services were neither recommended nor approved by the IU staff working with Student. (N.T. pp. 601—603) Although the Parents’ independent psychologist testified that she “could see some of the services [Center] provide[s] being beneficial” she did not testify that such services were necessary. (N.T. p. 506) As explained above, a public agency is not required to fund “beneficial” services.

The Center services are also academic in nature, not specifically directed toward preschool developmental needs. (FF 13) The local center does not currently serve preschool or early elementary school age children. (FF 15) Such services, therefore, do not fit the Pennsylvania model of early intervention services. Most important, on the assessment repeated in the Center evaluations in 2009 and 2010 that measures receptive language, an important component of the Child’s primary area of need, the Child made significant progress while receiving only the IU services, as acknowledged by the witness from Center. (FF 14)

### **CONCLUSION**

For the reasons explained above, Parents in this case did not establish a denial of appropriate early intervention services by the IU. To the contrary, the facts in this case establish that the Child made significant progress in the area of identified need, speech/language impairment, and that the IU did not fail to identify additional needs that so significantly impeded the Child’s developmental progress that additional services were required.

**ORDER**

In accordance with the foregoing findings of fact and conclusions of law, it is hereby **ORDERED** that the Intermediate Unit IU EI Program is not required to take any action with respect to the claims asserted in ODR case #01524-1011 AS.

It is **FURTHER ORDERED** that any claims not specifically addressed by this decision and order are denied and dismissed

*Anne L. Carroll*

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Anne L. Carroll, Esq.  
HEARING OFFICER

May 1, 2011